

## CONTESTED ELECTION CASE OF PARSONS v. SAUNDERS.

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JUNE 21, 1910.—Referred to the House Calendar and ordered to be printed.

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Mr. MILLER, of Kansas, from the Committee on Elections No. 2,  
submitted the following

### REPORT.

[To accompany H. Res. 829.]

The Committee on Elections No. 2, having had under consideration the contested election case of John M. Parsons, contestant, v. Edward W. Saunders, contestee, from the Fifth Congressional District of the State of Virginia, submit the following report:

There have been presented to the committee in this case the following questions:

First. Has the legislature of a State the right to redistrict a State more than once between enumerations?

Second. Does the redistricting act of 1908 of Virginia comply with the Constitution of the United States, the United States apportionment act under the Twelfth Census, and the constitution of the State of Virginia?

Third. What effect attaches to the nomination or attempted nomination of an adjudged lunatic, and ought his name on the ballot to be regarded?

Fourth. Does the provision in the constitution of the State of Virginia relative to the tax-paid posted list constitute an exclusive method of proof, or may other methods be employed?

Fifth. Certain questions as to the validity of particular ballots.

Sixth. Questions as to voters for each candidate who were either permitted or refused permission to vote.

From this recital it will be seen that the contest presents most interesting and important questions, all of which were presented to and argued before the committee with great ability.

The facts, so far as they relate to the question decided by this committee are as follows: Under the Eleventh Census, the State of Virginia had 10 representatives in the House of Representatives. This number was not changed under the apportionment made after the enumeration under the Twelfth Census; and Representatives continued to be elected from the districts as constituted by the

Virginia legislature by the act approved February 15, 1892. In 1902 a redistricting bill passed the legislature, but was vetoed by the Governor upon the ground that it did not comply with section 55 of the constitution of Virginia; and, although the legislature and governor were of the one party, and there was abundant majority in the legislature to have passed the bill over the governor's veto, it was not done.

In 1906, by an act approved February 23, 1906, the legislature passed an act in form a complete reapportionment. Under this act the fifth district was continued, consisting of the city of Danville, the town of Danville, and the counties of Pittsylvania, Henry, Franklin, Floyd, Patrick, Carroll, and Grayson, with a population of 175,579, according to the enumeration of 1900. The adjoining sixth district was so constituted that it had a population of 181,571. In 1908 the legislature passed another act, in form a complete apportionment, which took Floyd County from the fifth district and added it to the sixth district, reducing the population of the fifth district to 160,191 and increasing that of the sixth district to 196,959. In other words, making the smaller of the two districts still smaller and the larger still larger.

The fifth district was a very close district politically, and upon its face, the act of 1908 seems to have been passed for the sole purpose of securing a partisan advantage. The contestee, while not admitting or conceding this, states (p. 133 of the argument) that "he does not deny that political considerations entered into legislative motives for the change." The Republican party maintained that the redistricting act of 1908 was unconstitutional and elected their delegates to the national convention of 1908 from the district as constituted in 1906, and at the nominating convention for Congress of 1908 delegates from Floyd County were present and participated, and over a thousand electors in Floyd County voted for the fifth district Republican nominee in 1908 for Congress.

In the counties other than Floyd the committee has recounted the entire vote, finding 7,025 for E. W. Saunders, the sitting member and the contestee; 6,910 for J. M. Parsons, the contestant; 15 for Elliott Matthews, an adjudged lunatic; 239 void ballots, 115 of which are reported by the subcommittee for the consideration of the full committee; 79 from which the voter erased the name of Mr. Parsons, leaving on the name of both Mr. Saunders and Mr. Matthews; and 133 from which the name of Mr. Saunders was erased, leaving the names of both Mr. Parsons and Mr. Matthews.

Does the redistricting act of 1908 of Virginia comply with the Constitution of the United States, the United States apportionment act of the Twelfth Census, and the constitution of the State of Virginia?

Article 5, section 55, constitution of Virginia, is as follows:

The general assembly shall by law apportion the State into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

As the constitution of Virginia uses the express language of the statute of the United States with reference to the limitations of legislative discretion, which it seems to have adopted verbatim, the act

of 1908, now in question, may be examined and the validity determined under the provisions of the constitution of the State in which this case arises. The facts and the authorities are equally applicable, however, whether we decide the case under the Virginia constitution or under the federal statute, which the Constitution of the United States makes paramount to any state constitution.

Historically these provisions of the statute of the United States, as of the constitution of Virginia, were clearly intended to constitute restraints upon legislative discretion so as to prevent the well known vicious political device of forming congressional or other legislative districts for mere partisan purposes.

These restrictions upon the legislative power are:

1. Legislative districts must be composed of contiguous territory.
2. Legislative districts must be composed of compact territory.
3. Legislative districts must contain an equal number of inhabitants.
4. The only qualifications to these requirements is the phrase "as nearly as practicable."

The rule is well established that the Constitution must be so construed that every word and phrase of the organic law shall be given meaning and purpose; also that constitutional provisions are mandatory.

The constitutional question to be determined in this case may be stated as follows: Does the redistricting act of 1908 of Virginia conform to that State's constitutional requirement of contiguity, compactness, and equality of inhabitants as nearly as practicable? If it does conform, the act is valid. If it does not, the act is unconstitutional, null, and void.

The facts of the case, as presented and argued before the committee, briefly and succinctly stated, are:

1. Contiguity: An inspection of the map of the district would seem to show that notwithstanding the taking of Floyd County out of the body of the district, thereby nearly severing it into two parts, there still remained an apparent strip of contiguity 10 miles in width measured by a straight line across. The evidence before the committee, however, shows conclusively that at this point, running from the boundary of Floyd County across to the state line, there is a mountain ridge which prevents public travel by road between the inhabitants of the one-half of the district with the inhabitants of the other half, except by going south into the adjoining State or north into the county of Floyd. This mountain barrier destroys in fact, if not in form, the apparently small strip of contiguity shown upon the map of the district.

2. Compactness: An examination of the map of the fifth and sixth districts prior to this special apportionment of 1908 reveals the fact that the outline of the fifth district was fairly compact, but that the sixth district was abnormally elongated, with a tier of counties upon the other, extending in the form of a "shoe string" over the northern half or more of the fifth district. The removal of Floyd County under the apportionment act of 1908 from the body of the fifth district clearly destroyed its former compact form, and grossly aggravated the lack of compactness of the sixth district by attaching Floyd County to the extreme end of the excessively abnormal district.

3. Equality of inhabitants: The nature of this special apportionment, however, is most strikingly shown in the complete disregard of the requirements as to the equality of inhabitants. The unit of population under the apportionment was 180,000. The fifth district had a population, according to the census, of 175,579, or nearly 5,000 below the unit, while the sixth district had a population of 187,523, or 7,500 above the unit. In short, the sixth district exceeded the fifth in population by 12,000. Floyd County, under the census, had a population of 15,388. By transferring it from the lesser to the larger district, the fifth was reduced to 160,191, or 20,000 less than the unit; and the sixth was increased to 202,921, or 23,000 above the unit. In other words, the former difference of 12,000 was deliberately enlarged into a difference of 43,000 inhabitants.

The phrase, "as nearly as practicable," indicates that these constitutional requirements do not seek to enforce perfection. Absolute contiguity, compactness, and equality of inhabitants are impossible of attainment. Mr. Webster discussed the general subject of apportionment in the Twenty-second Congress, first session, in an elaborate report, and with singular clearness and force laid down this rule:

That which can not be done perfectly must be done in a manner as near perfection as can be. If exactness can not, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

Congress is not absolved from all rule merely because the rule of perfect justice can not be applied. In such a case approximation becomes a rule; it takes the place of that other rule which would be preferable but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or that exact right can not be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable and no more to be departed from than any other rule or obligation.

Applying the Webster rule to this case, we can not find any approximation toward the exact truth, exact right, or exact justice; on the contrary we find that the state legislature of Virginia turned its back on these constitutional requirements and deliberately moved away from them.

The contestee suggests a test. On page 127 of the argument of counsel he says:

Our court has stated the principle of noninterference with legislative discretion more strongly than any other court. Yet, pushed to an ultimate analysis, if an act was passed in our State which could be fairly said to be no apportionment, I believe our court would interfere to avoid it.

We believe that the facts stated present even such a case as would clearly come under the rule laid down by the contestee. The basic idea underlying the word apportionment suggest an approximation to the truth, to the right, to equality, and to justice. The very purpose of an apportionment every ten years is solely to approximate more closely a just and fair equality of representation by congressional districts. Can anyone say that this subsequent change of districts of the act of 1908 was an apportionment? On the contrary, it appears to us that it was a perversion of the term. It was a violation of the spirit and the meaning of an apportionment under the constitution, and may be rightly declared no apportionment at all.

The case of *Carter v. Rice*, New York, relied on by the contestee, which, although it has been superseded, if not directly, yet by necessary implication, presents other tests. The court says: "We think

the courts have no power in such cases to review the exercise of discretion intrusted to the legislature by the Constitution, unless it is plainly and grossly abused." And again the court speaks of such a phrase as "nearly as may be" as a "direction addressed to the legislature, in the way of a general statement of principles upon which the apportionment shall, in good faith, be made."

Again the court says: "Of course cases can be imagined in which the action of the legislature would be so gross a violation of the Constitution that it would be easily seen that the organic law had been entirely lost sight of."

We have been unable to reconcile the facts in this case with any reasonable definition of "good faith;" on the contrary, we are convinced that this case presents a "plain," palpable, and "gross abuse" of legislative power. We are also clearly of the opinion that this case presents such a violation of the fundamental law that it is easily apparent that the legislature lost sight of the organic law in its evident purpose to prevent the loss of a congressional district to the dominant party organization of the State.

When we apply the tests laid down in leading cases by the great majority of the higher courts of the States of the Union where the validity of acts of this kind have been judicially determined, the invalidity of the act of 1908 is made clear beyond any possible doubt. (*The State v. Cunningham*, 81 Wis., 440; *the State v. Cunningham*, 83 Wis., 90; *Giddings v. Blacker*, 93 Mich., 1; *Parker et al. v. the State; ex rel. Powel*, 133 Ind., 178; *matter of Sherrill v. O'Brien*, 188 N. Y., 185.)

These leading cases are so voluminous and exhaustive in reviewing the decisions of the higher courts on this subject that it is difficult to cite any special portion of them. They lay down the rule, however, that these constitutional requirements call for "an honest and fair discretion in apportioning the districts." That their purpose was "to secure a fair and just representation" to the people, and especially emphasize the Webster rule that "where perfect exactness can not be had," there should be "as close an approximation to exactness as possible," and that "this is the utmost limit for the exercise of legislative discretion."

The rule suggested in the case of *Giddings v. Blacker* (93 Mich., 1), is stated as follows:

The State can not be divided into senatorial districts with mathematical exactness, nor does the constitution require it. It requires the exercise on the part of the legislature of an honest and fair discretion in apportioning the districts so as to preserve, as nearly as may be, the equality of representation. This constitutional discretion was not exercised in the apportionment act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can make the demonstration plainer. There is no difficulty in making an apportionment which shall satisfy the demand of the constitution.

On the subject of the motive actuating the legislature the court well says:

While it is true that the motive of an act need not be inquired into to test its constitutionality, I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in, without rebuke, that it threatens not only the peace of the people, but the permanency of our free institutions. The courts alone in this respect, can save the rights of the people, and give to them a fair count and equality in representation. It has been demonstrated that the people themselves can not right this wrong. They may change the political majority in the legislature, as they have

often done, but the new majority proceeds at once to make an apportionment in the interest of its party, as unequal and politically vicious as the one that it repeals. There is not an intelligent school boy but knows what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more or less than partisan advantage taken in defiance of the constitution and in utter disregard of the rights of the citizen.

The rule as laid down in *The State ex rel. Lamb v. Cunningham*, Secretary of State (83 Wisconsin, 90), is as follows:

It is proper to say that perfect exactness in the apportionment according to the number of inhabitants is neither required or possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it can not possibly be justified by the exercise of any judgment or discretion and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the Constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever.

On the subject of the powers of courts to adjudge invalid legislative acts violating the provisions of the Constitution the court in *Parker et al. v. The State, ex rel. Powell* (133 Indiana, 178), says:

The power to adjudge invalid such legislative acts as violate the provisions of the Constitution is an element of sovereignty, and is vested in the judiciary. It would be a surrender of a high constitutional power, that neither principle nor precedent will justify or excuse, to decline to give judgment upon the validity of an apportionment act when properly presented and necessary to a decision of a case brought to the bar of the court. Such a surrender would involve a breach of duty so flagrant that the most stinging rebuke would fall far short of an adequate condemnation of a court that would so grossly violate the trust imposed upon it by the Constitution.

In a government of distributed powers such as ours is the power to adjudge acts void that conflict with the Constitution must necessarily reside elsewhere than in the lawmaking department; otherwise all governmental power would be unified and solidified in that department, and it would be the uncontrolled and absolute master and arbiter in all governmental matters. If there be no such power in the judiciary, the constitutions of the nation and the State are, in their widest scope and minutest details, mere mockeries; but the power does reside in the judiciary, and it was placed there in the strongest terms by men who knew the science of government in all its parts, and there it will remain as long as free government endures.

The only case that has come to our attention which squarely denies the judicial power of the courts to review legislative discretion in apportioning congressional districts is that of *Wise v. Bigger* (79 Va., 269). This case was decided apparently with but very little consideration of the question and is not supported by a single cited authority, and, after examining and reviewing all the decisions on this constitutional question, it must be conceded that this Virginia case stands alone, unsupported by authority, and that it is in direct conflict with every other judicial decision so far rendered in this country. Of this case the Indiana court, on page 190, says:

The court assumed that the questions presented were judicial and not political, and proceeded to adjudicate upon the validity of the law. The conclusion at which we arrived in this case is in accordance with all the authority to which our attention has been called, except the case of *Wise v. Bigger* (79 Va., 269), in which the validity of an act of the general assembly of the State, creating districts for Representatives in Congress, was called in question. All that was said by the learned judge who wrote the opinion in that case at all pertinent to the question involved in that case was that: "The laying off and defining the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people, whose representatives they are."

This would be literally true in the absence of some constitutional provision requiring the districts to be formed in some particular manner. The opinion cites no authority

to the rule thus announced, nor does the judge who delivered it give any argument in its support; but if it is to be construed as holding that all apportionment acts are but the exercise of a political or discretionary power, it is in conflict with the great weight of authority, and can not be followed.

The contestee in this case relies on the report made by a committee of the House in a case known as *Davidson v. Gilbert* (Hinds, vol. 1, sec. 313), which expresses doubt as to the powers of Congress under the Constitution to pass upon this subject, and even if the power is conceded, it doubts the expediency of applying it.

We hold that *Davidson v. Gilbert* is not a valid precedent for the following reasons:

1. The report was never adopted or otherwise acted upon by the House.

2. The report is based upon entirely different conditions. The old constitution of Kentucky, in force when the case of *Davidson v. Gilbert* arose in that State, contained very general, if any, limitations upon the legislative discretion. In the case before the present committee the limitations of the state constitution are definite and certain in terms. We are of the opinion that had that case arisen under a constitution such as that of Virginia the decision by the former committee would have been quite different. This committee is acting under the authority of the United States Constitution, Article I, section 5. "Each House shall be the judge of the elections, returns, and qualifications of its own members," and we are determining the validity of a state law under the constitution of the State from which this contest comes.

3. There being no provisions in the constitution of Kentucky under which the validity of the state law could be determined, the objection was made by the contestant that the Kentucky act controvened an act of Congress and this objection was considered at length in the light of Article I, section 4, of the Constitution.

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators.

We doubt the validity of the reasoning of the report under that section of the United States Constitution. It is based upon an antiquated states-rights doctrine ably championed by statesmen before the civil war, but is inconsistent with the legislative declarations of Congress for the past four decades, is an assault upon the present federal statute, and has been completely and finally refuted in two decisions of the United States Supreme Court. (Ex parte Siebold, 100 United States, p. 373, also ex parte Yarbrough, 110 United States, p. 660.)

The case decided in ex parte Siebold did not turn directly on the question now under consideration; but this was included in the general argument of the court.

In reply to the main contention of the states rights champions, the court says:

The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules loses sight of the fact that the regulations made by Congress are paramount to those made by the state legislature, and if they conflict therewith the latter, so far as the conflict extends, ceases to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one

system of the regulations made by the two sovereignties any more than there is in the case of prior and subsequent enactments of the same legislature.

Congress has partially regulated the subject heretofore. In 1842 it passed a law for the election of Representatives by separate districts and, subsequently, other laws fixing the time of election and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject. (Ex parte Siebold, p. 384.)

On the subject of the respective duties and rights of the States and the United States, the court says:

It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the state government is. It certainly is not bound to stand by as a passive spectator when duties are violated and outrageous frauds are committed (p. 384 supra).

The decision in *ex parte Siebold* was cited and approved in another case, *Ex parte Yarbrough*. (U. S. Rept. 110, p. 660.) Referring to Article I, section 4, of the Constitution above quoted, the court says:

It was not until 1842 that Congress took any action under the power here conferred, when, conceiving that the system of electing all the Members of the House of Representatives from a State by general ticket, as it was called, that is, every elector voting in that House, worked injustice to other States which did not adopt that system and gave an undue preponderance of power to the political party which had a majority of votes in the State, however small, enacted that each Member should be elected by a separate district composed of contiguous territory. (5 Stat., 491.)

And to remedy more than one evil arising from the election of Members of Congress occurring at different times in the different States, Congress, by the act of February 2, 1872, thirty years later, required all the elections for such Members to be held on the Tuesday after the first Monday in November in 1876, and on the same day of every second year thereafter. (Ex parte Yarbrough, p. 661.)

On the duty and rights of Congress to protect congressional elections by necessary legislation the court says:

Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide in an election held under its own authority for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud?

If this be so, and it is not doubted, are such powers annulled because an election for state officers is held at the same time and place? Is it any less important that the election of Members of Congress should be the free choice of all the electors because state officers are to be elected at the same time? (Ex parte Siebold, 100 U. S., 371.)

These questions answer themselves, and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers that they are now doubted.

But when in the pursuance of a new demand for action that body, as it did in the case just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons. (Ex parte Yarbrough, p. 661.)

On the general policy intimated as unwise in the report of Davidson v. Gilbert we commend the language of the Supreme Court of the United States (p. 666, Id.):

It is as essential to the successful working of this Government that the great organs of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption.

In a republican government like ours, where political power is reposed in representatives of the entire body of people, chosen at short intervals by popular elections,

the temptations to control these elections by violence and by corruption is a constant source of danger.

Such has been the history of all republics, and though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

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If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very source of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purpose, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand and unprincipled corruptions on the other.

After applying every reasonable and fair test suggested by common sense and judicial authority we have been impelled to this conclusion: This case presents as conclusive evidence of willful and deliberate legislative disregard of the fundamental constitutional requirements of contiguity, compactness, and equality of inhabitants as has come to the attention of the committee in reviewing the decisions of the courts of the various States of the Union that have declared similar enactments null and void. The only and the specific purpose of the act of 1908 in taking the county of Floyd out of the Fifth District and transferring it to the Sixth District, as appears from the evidence, was the political advantage that did result in making a close district barely safe for the dominant political party of the State.

This committee is a judicial tribunal. We have not the right to consider expediency or policy, politics or personality. We have but to decide the case upon the broad lines of justice as determined by the facts, the law, and the Constitution. But so far as we may go in considering the effect of our decision we believe that it will shut the door of the House of Representatives to one of the most insidious and dangerous political offenses that can menace democratic government.

Our conclusion is, therefore, that the redistricting act of 1908 of Virginia does not conform to nor comply with the Constitution of the United States, the United States apportionment act of the Twelfth Census, nor the constitution of the State of Virginia, and is null and void, and that Floyd County is still a part of the Fifth Congressional District and that the votes cast in said county for John M. Parsons, contestant, should be counted for him, which votes, together with the votes cast in the other counties of the Fifth Congressional District of the State of Virginia for said contestant, give him a clear majority of all the legal votes cast in said district at the November election of 1908, and that said contestant, John M. Parsons, is clearly entitled to his seat as a Representative from the fifth district of Virginia in the House of Representatives of the United States.

The conclusions which the committee has reached upon this one question, to wit, that the apportionment act of the legislature of the State of Virginia, approved March 14, 1908, was unconstitutional, null, and void, of course makes discussion of and decision on other interesting questions unnecessary. The committee include and make as a part of this report the following statement made by the contestee as found on page 7 of the arguments:

With respect to the county of Floyd, contestee submits the following:

This county, by act of the Virginia legislature, was transferred from the Fifth Virginia District to the Sixth Virginia District prior to the election in November, 1908.

At that election a number of voters undertook to vote for John M. Parsons, the Republican candidate for Congress in the Fifth Virginia District as constituted by the act aforesaid, erasing from the official ballot in the Sixth Virginia District the name of the Republican candidate in that district and substituting therefor the name of the said John M. Parsons as aforesaid. It is a part of the contention of contestant that these votes so cast for the said contestant in the said county of Floyd under the circumstances aforesaid can now be counted in favor of the contestant by this committee. Contestee utterly denies that this can be done under any view of the law, but should the committee hold that the Floyd ballots can be counted, contestee is willing to admit, as a matter of fact, that enough ballots were cast for said contestant in this county to overcome contestee's official majority in the Fifth District, as constituted by the act of 1908 as aforesaid. This statement of concession on the part of contestee will make it unnecessary for the committee to go through the formality of counting the Parsons ballots in the county of Floyd.

February 23, 1910.

E. W. SAUNDERS.

The committee therefore report the following resolutions, and recommend their passage:

*Resolved*, That Edward W. Saunders was not elected to membership in the House of Representatives of the United States in the Sixty-first Congress and is not entitled to a seat therein.

*Resolved*, That John M. Parsons was elected to membership in the House of Representatives of the United States in the Sixty-first Congress from the Fifth District of Virginia and is entitled to a seat therein.

JAMES M. MILLER.

JAMES F. BURKE.

DUNCAN E. MCKINLAY.

JOHN M. NELSON.

JOSEPH HOWELL.

WILLIAM S. BENNET.

PARSONS vs. SAUNDERS.

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JUNE 23, 1910 —Referred to the House Calendar and ordered to be printed, with illustrations.

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Mr. TOU VELLE, from the Committee on Elections No. 2, submitted the following as the

VIEWS OF THE MINORITY.

The undersigned members of the Committee on Elections No. 2, do not concur in the findings of the majority, that the sitting Member from the Fifth District of Virginia, Edward W. Saunders, is not entitled to his seat. Several reasons of law are assigned by the majority in support of their report. In order that the merits of the case may be adequately understood, a brief statement of the facts is necessary. The contestee was elected for two years at the election held in 1908. He duly received his certificate, qualified, took his seat, and has served in the present House from that time forward. His seat was contested by the defeated contestant, J. M. Parsons, on a variety of grounds. Eliminating those features which have been disregarded by the committee as lacking in merit, or unproven, the ground remaining which serves as the basis of the report of the majority is as follows: That the act of the Virginia legislature, passed in 1908, creating the district in which the election was held, was void.

First, because it was in contravention of the federal statute; second, because it was in contravention of the constitution of the State. The grounds assigned for the repugnance of the statute to the federal statute, and to the constitution of the State, are that the apportionment is a gerrymander, contrived and devised for party purposes and partisan advantage, and that the district created is not compact, composed of contiguous territory, and as nearly as may be equal in population with the other districts of the State.

Section 55 of the state constitution provides—

that the districts shall be composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants.

The federal statute provides that the Members of the House to which each State is entitled shall be selected by—

districts composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants.

It becomes pertinent, therefore, to inquire, first, whether the statute of the United States is binding on the States in the make-up of their congressional districts; second, if the House possesses the power of interference under the federal statute, whether it is a power which it should undertake to enforce, having in mind that if the gerrymanders in the States, effected by supposedly partisan bodies, are thought to be evil, this evil is not likely to be corrected by turning the process of redistricting over to another partisan body, that will be able to make its work coextensive with the country, and which will be subject to the same temptations to contrive unequal districts for party advantage as are supposed to operate upon the lawmaking departments of the States; third, does the language of the constitution of Virginia afford the right to the courts of that State to interfere with congressional apportionments upon the ground that they are considered to be inequitable, unfair, and unjust, and if it is ascertained that a proper construction of that constitution does not afford such authority, whether a foreign jurisdiction, standing in the relation of a court in its attitude to the Virginia constitution, would impose upon that constitution an interpretation different from one that has been afforded by the supreme court of the State?

The act of 1908 made two small changes in the districts of Virginia. It removed the county of Floyd from the fifth and transferred it to the sixth, and, in addition, transferred the county of Craig from the ninth to the tenth. Before this transfer the populations of the respective districts were as follows: Fifth district, 175,579; sixth district, 181,571. After the transfer the respective populations were: Fifth district, 160,191; sixth district, 196,959; difference of population in favor of the sixth, 36,768.

The transfer of the small county of Floyd from one district to the other constitutes the so-called outrage. It was stated in the argument, and not denied, that so far as Floyd was concerned, her natural interests and trade relations were with the sixth and not the fifth district. Her people are contiguous to the railroads in the sixth and trade with the towns on the lines of these roads. She has practically no trade relations with the fifth.

The motives of the legislature in passing this act are the subject of vehement criticism; but it is submitted that we are not in a position to determine all of the considerations which may have animated the law-making body in making the change. The contestee frankly admitted in his argument before the committee that political considerations doubtless entered into the legislative motive. This admission of a feature in this apportionment of 1908, which is common to all legislative apportionments, is recited in the majority report for no very apparent purpose unless this recital is designed to show that it is abhorrent to the majority to be confronted with such an element of legislative apportionments as "political considerations." If the mere fact of inequality of shape and disparity of population is to be considered, it will be pointed out later that there are many districts in the United States far more offending in these respects than this district from Virginia, and it is difficult to see why one of the least offenders has been selected for punishment. But mere criticism of the motives of the legislature is apart from this inquiry. It is more pertinent to examine, in the first place, whether the legislature of Virginia had the authority to make this change, and if so, to remit to the

people of that State the punishment of the offenders against justice and fair play, if such an offense has been committed. There are no decisions of any courts which undertake to say that the legislatures of the States are restrained by the federal statute, *supra*, in the composition and make up of the congressional districts. But this matter has been before Congress and has been the subject of inquiry on the part of this House, in a heated contest from the State of Kentucky, squarely presenting the question whether a State was inhibited by the federal statute from rearranging its districts at its pleasure. This was the case of *Davison v. Gilbert* in the Fifty-sixth Congress.

A simple recital of the facts in that case will show that it presents a most compelling appeal to the legislator who is disposed to omit constitutional or other legal considerations to seat a contestant merely because he believes that he has been unfairly or unjustly treated. The fact that the contestant was not seated upon such a showing was simply due to the further fact that the committee dismissed such considerations as extraneous, and proceeded to consider the case in part on the question of the power of Congress to deal with such a situation, and in further part on the propriety of its application, conceding, for argument's sake, the authority claimed for Congress by the contestant, they deplored in striking language the vicious effects likely to follow any effort on the part of the House to make a universal application of this authority to all the districts in the States at large whose make-up constitutes a supposed impingement upon the federal statute. The eighth Kentucky district was Republican by about 1,000 majority. The eleventh was Republican by a much larger majority. The difference in population between the two districts before the act of apportionment was greater than the difference between the fifth and sixth Virginia districts, even after the passage of the Virginia act complained of. This difference was about 43,834. Upon this state of facts, the Kentucky legislature proceeded to enact a statute transferring the county of Jackson, which had a large Republican majority, from the eighth to the eleventh district, thereby making the eighth a Democratic district and largely increasing the Republican majority in the eleventh. In addition, the effect of this transfer reduced the population in the eighth to 134,410, thereby making it almost the smallest district in the country, and increasing the disparity in population between the two districts, making a difference of 60,260 between them. (See notice of contest, *Davison v. Gilbert*.) Governor Bradley promptly vetoed this act, and the legislature passed it over his veto. The veto message is herewith reproduced.

## VETO MESSAGE.

STATE OF KENTUCKY, EXECUTIVE DEPARTMENT,  
Frankfort, Ky., March 10, 1898.

*To the Senate of Kentucky.*

GENTLEMEN: I return senate bill No. 54 without approval.

Subdivision 3 of section 2, Article I, Constitution of the United States, provides that the first enumeration for apportionment of Representatives in Congress shall take place within three years after the first meeting of Congress and within every subsequent term of ten years, in such manner as they may direct.

From time to time since the first apportionment, Congress has enacted laws regulating the same. In each of them, so far as I have been able to find, there is incorporated the injunction that Representatives in Congress shall be elected by "districts com-

posed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants," etc.

In 1890 the general assembly of Kentucky passed a bill reapportioning the State into 11 Congressional districts. Such bills have been passed every ten years since the first apportionment was made, and it was evidently the intention of the law that such legislation should not be indulged in oftener.

It is clear that Congress has the power to lay down the requirement in the various statutes as to how these districts should be apportioned. State legislatures may designate the counties, but in doing so must observe the rule that the districts shall be composed of contiguous territory and contain as nearly as practicable an equal number of inhabitants.

The act of 1890 was not in conformity to the act of Congress, but no objection was made to it.

The district apportionment under that act contained the following populations according to the last census:

First district, 170,530; second district, 174,805; third district, 176,184; fourth district, 185,385; fifth district, 188,598; sixth district, 160,649; seventh district, 141,461; eighth district, 142,626; ninth district, 176,177; tenth district, 147,294; eleventh district, 186,460.

It will be seen that the population of the districts range from 141,461 to 188,598. Owing to the urban character of the fifth district, which was entitled to but one Congressman, its population may be accounted for, but there is no reason why the difference should be so great between the populations of outlying districts, and it is clear that the United States statute was violated.

It is apparent that the object of the act of 1890 was not to apportion the State into districts as nearly as practicable equal in number of inhabitants, but to change the political status and to give the dominant party in the State a representation to which it was not entitled under the act of Congress. And it is even more apparent that the present bill has in view the same object. The taking of Jackson County from the eighth district, whose inhabitants number only 142,626 under the last census, and placing it in the eleventh district, whose inhabitants number 186,460 under the same census, thereby decreasing the population of the eighth district to 134,410 and increasing the population of the eleventh district to 194,676, can not be contended for a moment was done in order to make as nearly equal as practicable the number of inhabitants in each district. And to make the spirit of legislation even plainer, if possible, another bill has been since passed by which the counties of Monroe and Cumberland, with 19,434 inhabitants, have been taken from the third and added to the eleventh district, while Metcalfe, with a population of 9,871, has been taken from the eleventh and added to the third. So that, if both bills should become laws, the population of the eleventh district will be increased to 204,239, being 69,829 more than the population of the eighth.

Under the apportionment of the act of 1890 the State in 1896 gave a small Republican plurality. Only four Republican Congressmen were elected, however—a little over one-half the number elected by the Democrats. This would *prima facie* indicate that the act of 1890 was not drawn in conformity to the act of Congress. The present bill is a palpable violation of the national law and is doubtless intended to reduce the number of Republican Congressmen to three, thereby inflicting greater injustice than the act of 1890.

The effect of the bill is to deny representation to the people of the State through the party of their choice, and overrides an express provision contained in the act of Congress.

Respectfully,

WILLIAM O. BRADLEY,  
*Governor of Kentucky.*

A true copy.

Attest:

E. E. WOOD,  
*Assistant Secretary of State.*

This message recites all the matters that were subsequently alleged in the notice of contest in the case; that the act was for purely political purposes and partisan advantage; that it was contrary to the federal statute; that it took a county from a small district and added it to a larger; that in no sense could it be justified as an effort to make the district more compact or to conform more closely to the statute; that the State was already so gerrymandered that the Republicans had only four members, and that this

was a further and more outrageous gerrymander to reduce that representation to three, although upon the relative proportion of party voters in the State the Republicans were entitled to almost one-half of the delegation. This case, therefore, presented to the committee upon a stronger situation of facts than those occurring in the case in hand the precise question urged in the present contest, namely, that Congress can control the apportionment of the States into congressional districts, and that when an apportionment is made which is not considered to conform to the requirements of the statute in respect to compactness and equality of population in the districts, this apportionment can be disregarded by the House of Representatives and a contestant seated who did not receive a majority of the votes in the district in which the election was actually held. In this connection it may be said that the question of whether a particular apportionment is fair or unfair, just or unjust, in the ordinary acceptance of the terms, ought not to enter into this determination at all. All apportionments are political and are generally regarded by the opposing party as unfair or unjust. There is practically no apportionment which is made by a political organization which could not be re-formed so as to make it fairer and more just to the opposing organization. Waiving these considerations for the present as irrelevant, the proper questions for determination in a case like the one presented from Kentucky, or the one now before the House, is whether this body has the right to interfere with the apportionments made by the States, or whether, if it possesses that power, the interests of the Republic would be forwarded by an attempt on its part to exercise the same in some universal fashion. If it is to be exercised at all, it should not be exercised capriciously or spasmodically, but universally, so as to compel every district in the United States to be so constructed that in conformity with the statute it will be contiguous and compact, containing, as nearly as practical, an equal number of inhabitants.

For some reason not very apparent the majority report refers to a Virginia apportionment bill of 1902, which was vetoed by the then governor. The report declares:

And although the legislature and governor were of one party, and there was abundant majority in the legislature to have passed the bill over the governor's veto, it was not done.

There is not a line in the testimony as to the political make-up of the legislature of that year. The only reference to this situation is found in a colloquy between Mr. Bennett and ex-Governor Montague, of counsel for contestant:

MR. BENNETT. I assume that there was enough of one party in either branch to have had for that party two-thirds, or whatever was necessary.

MR. MONTAGUE. Your assumption is not a violent one at all.

(Printed argument, p. 54.)

In its attempt to show, whatever its purpose may have been, that the Democrats in the legislature acquiesced in the veto though "abundantly" numerous to overcome it by a two-thirds vote, the majority fails to support its charge in this respect by any reference to the record or to call attention to the fact that the contestee filed with the committee a matter of record (the acts of assembly) showing that on the day when the last acts were signed, which was

April 2, the governor sent in his veto message. The session was at an end, the members were scattered, and the opportunity to take up the veto was not afforded. (See printed argument, p. 223.) Whatever may have been the purpose of the majority in its use of this incident, that purpose is defeated by this recital of the actual facts in that connection. It is not pretended that the bill which was vetoed was in any wise connected with the measure which is under consideration or that this veto will throw any light on the constitutional questions which are the subject of inquiry.

The answer of the committee to the contentions advanced by the contestant in the case of *Davison v. Gilbert* is found in the report, which is reproduced in its entirety.

[House Report No. 3000, Fifty-sixth Congress, second session.]

DAVISON *v.* GILBERT.

[MARCH 1, 1901.—Ordered to be printed.]

MR. TAYLER, of Ohio, from the Committee on Elections No. 1, submitted the following report (to accompany H. Res. 443).

The Committee on Elections No. 1, to whom was referred the contested election case of George M. Davison *v.* George G. Gilbert, from the eighth district of Kentucky, make the following report:

The contestee was elected, as shown by the official returns, by a plurality of 841.

The claim of the contestant chiefly rests upon the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the eighth and eleventh congressional districts of Kentucky whereby the county of Jackson was taken from the eighth district and added to the eleventh. Jackson county having a large Republican majority, the effect of its transfer to the eleventh was to change the eighth from a district which had immediately previous been Republican into a Democratic district.

As respects this act, the contestant claimed three things:

First, that it was contrary to the constitution of the State of Kentucky;

Second, that it was never properly passed by the legislature in the manner required by the Kentucky constitution;

Third, that it was contrary to the act of Congress apportioning Representatives among the States.

As to the first two propositions, your committee has no difficulty in arriving at the conclusion that the act of March 11, 1898, was not in contravention of the Kentucky constitution and that it was, as far as we have authority to inquire, properly passed by the legislature.

The third proposition, namely, that it contravenes the act of Congress, is more serious, and requires more careful consideration.

The Federal Constitution, Article I, section 4, paragraph 1, is as follows:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

This provision of the Constitution has been very much discussed; first, as to the scope of the power granted to Congress respecting the manner of holding congressional elections; and, second, as to the expediency of the exercise of such power where it was sought to be exercised, if possessed, for the purpose of controlling the division of a State into congressional districts.

It is believed that this is the first time in the history of the Government when Congress has been called upon to undo the work of a State which had divided itself into the proper number of congressional districts.

When the Constitution was under consideration by the various States several of them opposed the unqualified acceptance of the provision above quoted, on the express ground that the clause was liable to misconstruction and that under its terms Congress might at some time seek to divide the States into districts, and in several States the ratifying body accepted the Constitution on condition that effort should be made to

change the phraseology so as to put this matter beyond dispute. For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative, and no more.

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act based upon the census of 1850 made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory, and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the State into congressional districts, or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

Justice Story, in his Commentaries on the Constitution, says:

"In answer to all such reasoning it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain within itself the means of its own preservation. A discretionary power over elections must be vested somewhere. There seem to be but three ways in which it could be reasonably organized. It might be lodged either wholly in the National Legislature, or wholly in the state legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted in the first instance to the local government, which in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily be by them exercised; but in extraordinary circumstances the power is reserved to the National Government, so that it may not be abused, and thus hazard the safety and permanency of the Union."

He adds: "It is not too much, therefore, to presume that it will not be resorted to by Congress until there has been some extraordinary abuse or danger in leaving it to the discretion of the States, respectively."

Hamilton, in the *Federalist*, makes this, among other comments, on the subject:

"Nothing can be more evident than that an exclusive power of regulating elections for the National Government in the hands of the state legislature would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."

Madison expressed the same views in the Virginia convention with great force, and expressed the opinion that if the elections were exclusively under the control of the state government the General Government might easily be dissolved.

Chancellor Kent, in his Commentaries, says:

"The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which has permitted them for the sake of their own preservation, and which it is to be presumed they will never be disposed to exercise except when any State shall neglect or refuse to make adequate provision for the purpose."

In the Twenty-second Congress, first session, an elaborate report was presented by Mr. Webster on the subject of apportionment. In the course of this exhaustive statement he discusses the very question which is here involved. The following extract is fairly representative of the rest of the report on that phase of the question:

"Whether the subdivision of the representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know

and has no authority to inquire. It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the State itself."

These are the guarded words of a great commentator on the Constitution, uninfluenced by any basis or special motive, except to justly interpret its provisions.

A remarkable and convincing speech is that made in the Twenty-seventh Congress by Nathan Clifford, then a representative from Maine and afterwards a justice of the Supreme Court of the United States. Mr. Clifford argued with great cogency against the theory that Congress had any such power as the act of 1842 undertook to express, and in our opinion those arguments have never been satisfactorily answered.

And, indeed, the force which the proposition contended for by the contestant in this case possesses is derived chiefly from the fact that, without objection for the last three decades, Congress has legislated as though no question was made as to its power over the division of States into districts. If the act of 1842, in which we find the first Congressional expression of power, had sought by its terms to define the geographical boundaries of every congressional district in the several States, it could not by any possibility have been adopted. So far as we have been able to learn, no friend of the amendment to that act contended that Congress had any such power. The construction of Madison, Story, and Kent, seems most reasonable and natural.

Your committee are therefore of the opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of congressional districts, or to revise the acts of a state legislature in fixing such boundaries; and your committee is further of opinion that even if such power is to be implied from the language of the Constitution, it would be in the last degree unwise and intolerable that it should exercise it. To do so would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering some kind of equality of distribution results.

Your committee therefore recommends the adoption of the following resolutions:

*Resolved*, That George M. Davison was not elected a Representative to the Fifty-sixth Congress from the eighth district of Kentucky, and is not entitled to a seat therein.

*Resolved*, That George G. Gilbert was elected a Representative to the Fifty-sixth Congress from the eighth district of Kentucky, and is entitled to retain his seat therein.

This report was never challenged, and Gilbert continued to hold the seat to which he was elected representing the same district for a number of years thereafter.

There has been no general reapportionment of the Virginia districts for a great number of years. In 1906 the city of Newport News was taken out of the second district and put into the first. In 1908 the county of Floyd was taken out of the fifth district and put into the sixth, and the county of Craig was taken out of the ninth and put into the tenth. At the time these transfers were made the fifth district had a population of 175,579 and the sixth a population of 181,571. After the transfer the relative population of the two districts was as follows: The fifth district, 160,191; the sixth district, 196,959. Both of these districts were Democratic at the time of the transfer, but the majority in the fifth district was small. Territorially the fifth district is a large district, and is not, as at present constituted, the smallest district in population in the State, the smallest being the eighth, with a population of 154,198. It is objected in this case, as in the Kentucky case *supra*, that the transfer of a county was made from a smaller to a larger district, and therefore the two districts do not contain an "equal number of

inhabitants as nearly as practical," as required by the federal act. This may be true, as a matter of fact, but the disparity in population is nothing like so striking as in the Kentucky case and falls far short of the disparities that have been effected in many other States in the creation of their districts, as will be shown by the following extracts taken from the Congressional Directory for January, 1910:

In California the population of the Fifth California District is 236,234 and of the sixth is 155,839, difference being 80,395.

In Connecticut the population of the second Connecticut district is 310,923, while that of the third Connecticut is 129,619, the difference in population being 181,304.

In Illinois the eighth district has a population of 286,643, and the fourteenth Illinois has a population of 170,820, the difference in population being 115,823.

In Iowa the first Iowa district has a population of 159,267, and the tenth Iowa 253,350, the difference in population being 94,083.

In Kansas the third district has a population of 284,537, and the fourth Kansas 157,842, a difference in population of 126,695.

In Michigan the ninth Michigan district has a population of 166,124, and the twelfth Michigan 275,525, a difference in population of 109,401.

In Minnesota the fifth Minnesota district has a population of 292,806, and the second Minnesota district 174,856, the difference in population being 117,950.

In Nebraska the second district has a population of 162,756, and the third district has a population of 211,780, the difference in population being 49,024.

In New York, in the city of New York, the fifteenth New York district has a population of 165,701, and the eighteenth New York, in the same city, 450,000, the difference in population being 284,299. In the rural districts of New York, the twenty-second has a population of 169,005, the fifteenth a population of 165,701, the thirteenth a population of 169,378, and the thirty-fourth a population of 220,208.

In Ohio the twelfth Ohio district has a population of 164,460, and the twenty-first Ohio has a population of 255,510, the difference in population being 91,050.

In Oklahoma, where the present districts were created by the enabling act of Congress, the fifth Oklahoma has a population of 315,106, and the first Oklahoma 225,373, the difference being 89,733.

In Pennsylvania the eleventh district has a population of 257,121, and the fourteenth Pennsylvania 146,769, a difference of 110,352.

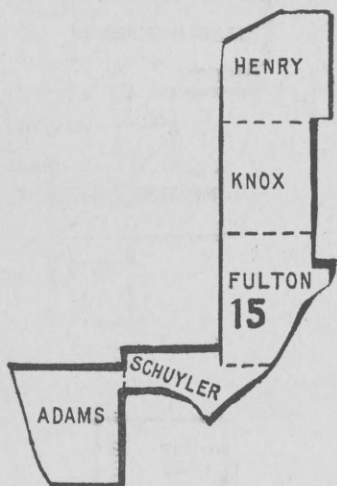
In the State of Colorado the first Colorado district has a population of 245,979, and the second Colorado 293,721, a difference of 47,742.

Many other disparities equally striking might be furnished, but these will suffice. Two things will be noted upon examination of these figures. First, the wide differences that the States have made in the relative populations of the districts which they have created; second, that if the fifth Virginia district is an unconstitutional formation by reason of the disparity of its population with that of the sixth, there are many other districts in the country at large offending in a much greater degree, and therefore calling for rectification. But it is submitted that the existence of these greater disparities in other districts, which make the districts in which they occur unconstitutional formations, in the view of the majority, merely tend to show from another standpoint that the States have not considered that their right to make these disparities was limited by any constitutional authority. The unchallenged exercise of this right from the foundation of the Republic, save in the one instance of *Davidson v. Gilbert*, in which the challenge was overruled, is in itself strong confirmation of the claim to the right on the part of the States. If the superior right to set aside the apportionments of the States on account of the disparities of population in the districts, created by the States, does exist in Congress, it would be a singular thing indeed if the first exercise of that right should occur in a case in which the disparity is so little to be remarked in comparison with others, as in

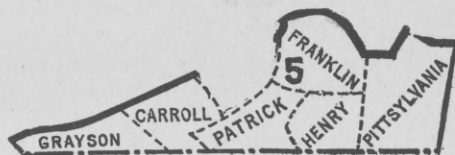
this case from Virginia. It is claimed in the majority report that the fifth Virginia district further offends against the federal statute, on the ground that it is not contiguous and compact territory. The objection on the score of contiguity is certainly not well taken, for the district is composed of a number of counties which touch each other in succession, as will be seen from the diagram and map filed. Contiguity means actual contact, nothing else, and the statute does not contemplate that each county in the district shall touch every other county, even if such a thing should be possible. It is stated in the report of the majority that as at present formed, a mountain ridge prevents public travel by road between the inhabitants of one portion of the district and the other, save by going through Floyd or North Carolina. The map to which the report refers shows that if the road from Patrick to Carroll goes through Floyd at all, it barely crosses, for the most insignificant distance, a sharp point which Floyd thrusts into Patrick. South of this road the map shows another road from Patrick into Carroll. The majority report further states that there is an apparent strip of contiguity 10 miles in width, measured in a straight line, across. This is intended to show that the counties are not contiguous save for this distance. But this is a mistake. The same map will show that, owing to the configuration of the two counties, they run together for as much as 30 miles, according to the map. The 10 miles is measured entirely in the county of Patrick. But granting, for the sake of argument, that the most convenient access from Patrick to Carroll would be through a small part of Floyd, what would it prove? There are many districts in which the most convenient means of access from one portion of the district to another is through some other district.

For instance, in the twenty-third Illinois district, in order to get from one side of the district to the other, say from Wabash County to Jefferson County, a traveler would have to go across Edwards and Wayne, in the twenty-fourth district, or else travel a much greater distance in order to make the trip and keep in the twenty-third district. So in the twenty-second district, an inhabitant of Washington County would find the direct road to Bond through Clinton, which is in the twenty-third. It is a new rule of constitutional requirement that districts must be so constructed that the most convenient roads from one section of a district to another must be confined to the district.

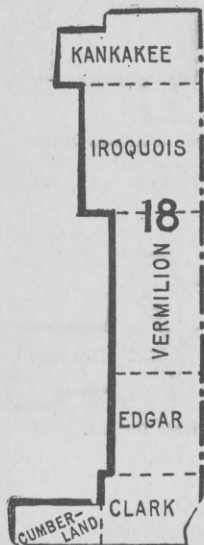
But as in the matter of population, so in the respect of compactness the fifth Virginia district does not offend in any marked or striking degree; to such a degree, in comparison with other districts created in other States, that on this ground the act of the legislature of a State should be set aside, and the results of an admittedly honest election be nullified. For the purposes of comparison, the maps of a number of districts, taken from the Congressional Directory for 1910, are submitted in this connection.



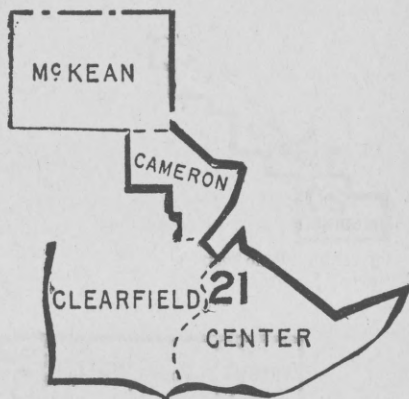
Fifteenth Illinois District.



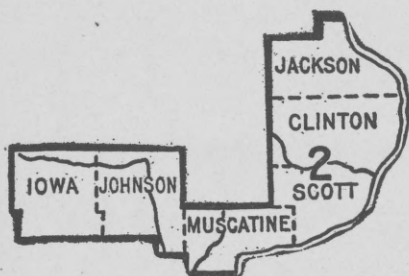
Fifth Virginia District.



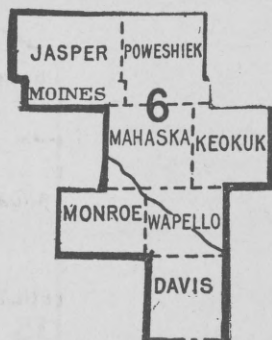
Eighteenth Illinois District.



Twenty-first Pennsylvania District.



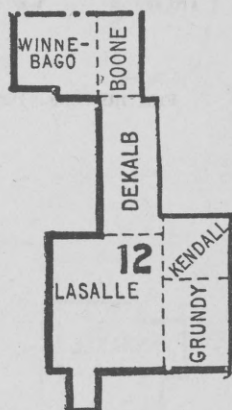
Second Iowa District.



Sixth Iowa District.



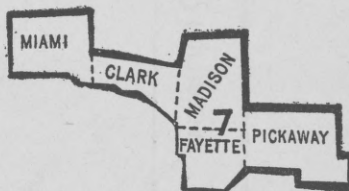
Twenty-eighth Pennsylvania District.



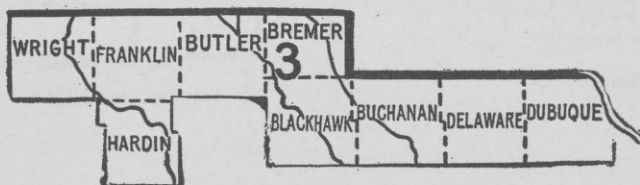
Twelfth Illinois District.



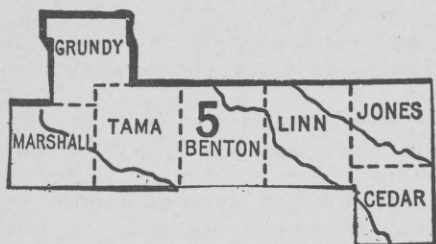
Twentieth Ohio District.



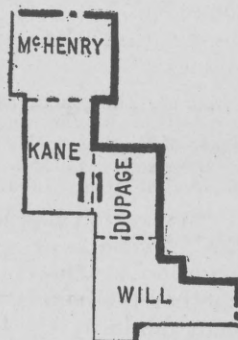
Seventh Ohio District.



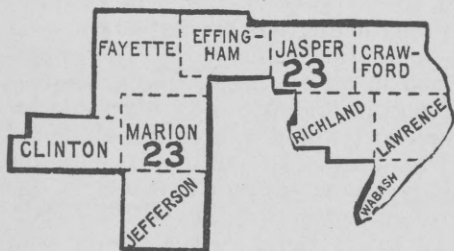
Third Iowa District.



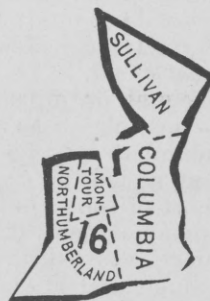
Fifth Iowa District.



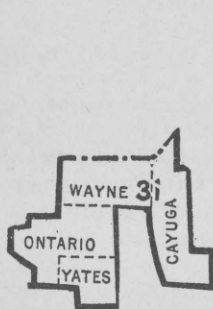
Eleventh Illinois District.



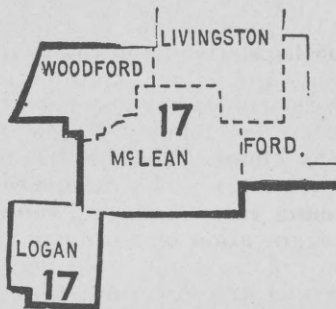
Twenty-third Illinois District.



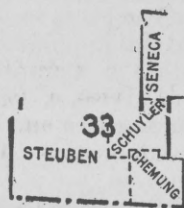
Sixteenth Pennsylvania District.



Thirty-first New York District.



Seventeenth Illinois District.



Thirty-third New York District.

The report of the majority also finds that the Virginia statute of 1908 is in contravention of the state constitution. The section of the constitution relating to apportionments for Members of Congress is as follows:

SEC. 55. The general assembly shall, by law, apportion the State into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

This section has been the subject of construction in Virginia, and like provisions in other constitutions have been the subject of construction by the courts of those States. The question presented is whether the courts have power to set aside and annul an apportionment made by the legislature, provided the apportionment does not conform to the judicial concept of a constitutional apportionment. This precise question has been decided by the courts of seven States, and the decisions are irreconcilably antagonistic. The courts of New York, Illinois, Virginia, and Ohio hold that when an apportionment is made under such a constitution as that of Virginia the judicial authority will not interfere with such an apportionment unless it is of such a character as will warrant the courts in saying "that it is *no apportionment at all*." It is not sufficient to say that the apportionment is unequal, or unjust, or unfair, or that the districts are not as compact as possible, or as nearly equal in population as may be. The apportionment may be liable to criticism in all of these respects; but so long as it is an *apportionment*, though it is *unfair* and *unjust* and far short of the requirements that the court would impose if making the apportionment, it will be allowed to stand. In Virginia its supreme court was asked to annul a congressional apportionment on the ground that it was an unjust gerrymander and lacking all the constitutional requirements. It declined to interfere, on the ground that making apportionments was a "political function of the legislature with which the court had no concern." The courts of Michigan, Indiana, and Wisconsin fully support the proposition that the courts when acting under a constitution like that of Virginia can, in substance, compel the lawmaking department to make an apportionment conforming to the judicial idea of a proper apportionment by successively annulling legislative apportionments until at last one is enacted that will receive the judicial approbation.

The cases in which the courts have declined to interfere with legislative appointments are as follows: *People v. Rice* (135 N. Y.), *State v. Campbell* (48 Ohio), *People v. Thompson* (155 Ill., 481), and *Wise v. Bigger* (79 Va.). The difference of attitude between these cases and the cases from Michigan, Indiana, and Wisconsin is fundamental. One aggregation of authority holds that the legislature, in case of an abuse of discretion in the matter of apportionments, is amenable to the people whose servants they are; the other stoutly maintains that if the legislatures will not be good, according to the judicial conception of how their discretion should be exercised, the courts will constrain them to be good. This difference of attitude will be best developed by citations from these cases.

There should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. (83 Wis., 90.)

But there was strong dissent from this conclusion.

To make up districts mathematically according to population, and geometrically according to compactness, would not necessarily be in the public interests, or best suit the interests of those immediately affected. (83 Wis., 168; dissenting opinion.)

The legislative discretion is a wide one. They may consider things such as community of interest, facility of communication, the general topography, the rapidity with which population is increasing, and many other things with which this court has nothing to do and which it can not know. This court can not take evidence as to these outside considerations, but I have no doubt of the power of the legislature to do so in the exercise of its discretion. (83 Wis., 169; dissenting opinion.)

Passing to the consequences of inconvenience flowing from a judicial interference with the exercise of legislative discretion, the judge proceeds as follows: Two laws have been assailed in succession in Wisconsin. Another one might be passed, and that too assailed and overthrown, requiring still another session of the legislature and another statute.

By the time this process has been repeated several times it will be a serious question whether the law finally resulting is the offspring of the legislature or of the court. Has not the legislature acted simply as the recorder of the decrees of the court? Has not its discretion vanished, and been supplemented and superseded by the discretion of of the court? Has not, in fact, the court made the law and thus invaded the province of its coordinate branch of government? The court has assumed to itself legislative power. It has practically substituted its discretion for the legislative discretion. No essay on our form of government is necessary to show that an encroachment of one branch of government on the proper powers of a coordinate branch is a greater evil than the evil of gerrymandering. I am not defending gerrymandering. I recognize it as an evil, though I think its bad effects are greatly overestimated. I think there are very few, if any, instances in which power has been retained for any length of time by the minority by means of a gerrymander. (83 Wis., 169-170; dissenting opinion.)

The very fact that the duty of apportionment is imposed on the legislature, a body charged with the exercise of judgment and discretion, is a strong implication that discretion is intended to be exercised. If it were simply a question of addition and division, a board of arithmeticians would answer the purpose better. There is, therefore, a large discretion in the legislature, a discretion with which a court should hesitate long before interfering. (Id., 163.)

*Parker v. State* (133 Ind.) fully holds that when an apportionment does not conform, in the judicial opinion, as nearly as may be, to the requirements of compactness, and equality of population, the court will annul the same. To the same effect, *Giddings v. State* (93 Mich.), which is in full conformity with the conclusions reached by the Wisconsin and Indiana cases. But in the Indiana case, as in the Wisconsin case, there was a strong dissent on the ground that—

*Whatever the abuse*, if any, of the discretion vested in the legislature, long-settled principles forbade the court to give judgment on the question of the invalidity of the apportionment act. (See *Parker v. State*, 133 Ind., dissenting opinion.)

As against these authorities, which are relied on by the majority report, there may be set the cases cited from New York, Ohio, Illinois, Massachusetts, and Virginia. The New York case is that of *Carter v. Rice*, in which the court was asked to avoid a state apportionment, on the ground that it was a peculiarly vicious gerrymander. The statement of facts in that case shows that the departure from the requirements of the constitution were very great, and the inequalities and disparities more excessive than those in the Virginia apportionment act complained of. Thus one district in New York had a population of 241,138, while another had only 105,720. Cattaraugus, with 47,727 inhabitants, had two members of the legislature, while Suffolk, with 50,030, had only one. Orange, with 82,225 inhabitants, had two members, while St. Lawrence, with 78,014, got three. The latter county, with a population of 78,000, had the same representa-

tion as Monroe, which exceeded it in population by 50,000. All this made out a strong case of gerrymander, yet under a constitution which was practically identical with the one in Virginia, the court of appeals of New York declined to interfere with the act, averring that the same reason which would set aside the act of 1892 would set aside the act of 1879, which was known at its passage as a most unjust and unequal one. This would be true in Virginia. If the act of 1908 is void, on the grounds alleged, then the act of 1906 is equally void and the act of 1884 as well, for they are all affected with the same sort of disparities. Indeed, the act of 1884 was drawn in question before the supreme court of Virginia on this very ground.

If a shoe-string district, in an act of apportionment, is void, then the original sixth Virginia district is void, for the same map which is submitted to show that the fifth Virginia district is now a shoe-string district, will show that the sixth Virginia district was more of a shoe-string before the act of 1908 than is the fifth district, as at present constituted. The act of 1908 has really made the sixth district more compact. But the act which originally constructed the shoe-string sixth would, according to the above suggestion, be unconstitutional as to that district. In consequence, the acts of 1906 and 1884, would be unconstitutional.

The several portions of an apportionment act are so largely dependent on each other that if the constitutional requirements are violated in some of the assembly districts the whole act must be held to be void. (*State v. Cunningham*, 81 Wis., 442.)

The following citations from *Carter v. Rice* are relevant and pertinent, bearing in mind that the constitution of New York and the present constitution of Virginia, so far as they respectively relate to apportionments, are practically the same:

The power to readjust the political divisions of a sovereignty, with reference to the representation of the inhabitants in the legislature rests, of course, in the first instance, in the people. The essential nature of the power is political, as distinguished from legislative or judicial power. The power to review in the courts exists when the people have so limited the exercise of the power to readjust the political divisions of the State, that the power thus limited has become, in the hands of the persons intrusted with it, one of ministerial nature only. (*Carter v. Rice*, 135 N. Y., 499-500.)

In seeking for a correct solution of a legal question, especially the proper construction of a statute or constitution, the result which may follow from one construction or another is always a potent factor, and is sometimes in and of itself conclusive. What result would follow, if it were held that the legislature had overstepped its discretion in this particular case? In the first place, we would have every enumeration and every act of apportionment brought before the court for review. The same reason that would set aside the act of 1892, would set aside the act of 1879. (*Id.*, p. 507.) For us to adjudge the act unconstitutional and declare it void would, in my judgment, be a most unwise construction, and would be to arrogate a power of interference as dangerous in the precedent as it seems unwarranted by law. (*Id.*, 512.)

The legislature, in this case, is intrusted with some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might, in its exercise, possibly have come nearer to an equality, after complying with the special conditions mentioned in the constitution? This would be to assert a power in the courts to supervise the use of the discretion given to the legislature, if such discretion were exercised in the slightest degree, after the constitutional mandate in regard to the county lines and county members had been complied with. *We do not believe in the necessity or propriety of any such rule.* On the contrary, we think the courts have no power in such cases to review the exercise of discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. (*Id.*, 501.)

There is a later case than *Carter v. Rice*, which holds that the courts of New York can set aside a legislative apportionment not conforming

to the judicial idea of a fair and just apportionment. But this case was decided under a later constitution, and, so far from overruling the Rice case, it affirms its authority upon such a state of facts as existed when it was decided. For the purposes of this inquiry, which is the interpretation of the Virginia constitution, the case of *Carter v. Rice* is as potent authority as if *Sherrill v. O'Brien* had never been decided. A few extracts from the later case will make it clear that it is not a reversal of the former case.

One or more of the judges who sat both in the former and in the latter case, and concurred in the last decision, call attention to the fact that the second decision is not in conflict with the first, but is properly decided upon a new state of facts. The following citations are made from the case of *Sherrill v. O'Brien*:

Can it be doubted that in view of the history of the constitutional change in regard to a legislative apportionment, which shows an actual withdrawal from the legislature of discretionary power and the continued adding of limitations upon their power relating thereto, and in view of the clear intention of the constitutional convention of 1894 and the people in adopting the constitution, that this court should now hold that the minimum of discretion necessary to preserve county and other lines, and to give reasonable consideration to the other provisions of the constitution, is left to the legislature? Can we doubt, with respect to this legislative enactment, that it is subject to review by the court? (*Sherrill v. O'Brien*, 188 New York.)

While we recognize the binding force of the case of *Carter v. Rice* as applied to the facts then before the court, and in the construction of the constitution as it then existed, we are of the opinion that the constitution as it now exists should be construed so as require that the legislature, in dividing the State into districts, make so close an approximation to exactness in the number of inhabitants in the district as is reasonably possible, in view of the other constitutional provisions, and that such approximation is the limit of legislative discretion. (Id.)

I should hesitate to agree with the opinion of my brother Chase as to the unconstitutionality of the apportionment act if I were not convinced that the amendment to the state constitution in 1894 had materially changed the rules which should govern the apportionment by the legislature of the representatives of the citizens of the State.

In the case of *People ex rel. Carter, v. Rice* (135 N. Y., 473), which involved the apportionment act of 1892, and in the decision of which I took part, I was of the opinion that the then existing constitutional provision vested a certain discretion in the legislative body in exercising its power with which the court should not interfere when there had been neither a flagrant disregard nor an unmistakable violation of the constitutional injunction that the apportionment should be "as nearly as may be" according to the number of citizens.

As may be discovered from the debates in the constitutional convention of 1894, the decision of the Rice case moved that body to recommend new provisions or rules for an apportionment. They were intended to remedy whatever defectiveness in the old rules made possible the inequalities observed in the preceding apportionment act.

It is of great significance, and it necessarily has a most important bearing upon the attitude of the court toward the legislative action, that the article of the constitution (Art. III, sec. 5) expressly provides for a judicial review of any apportionment by the legislature.

The legislature now exercises its power subject to review by the court of its act, which any citizen may invoke. The article, in its present form, as Judge Chase well points out, reduces the discretionary power of the legislature to a minimum. The limitations upon its exercise are relaxed, practically, only with respect to the preservation of county, town, and block lines. (Id., from Justice Gray's opinion.)

It must not be forgotten that the facts in the case of *Carter v. Rice* showed a gerrymander more outrageous than the one with which we are dealing from Virginia. The court in the first case declined to interfere with the legislative discretion, on the grounds set out in their opinion, and allowed the apportionment to stand. The later case in nowise reverses the former case, or indicates that it was incorrectly decided. To the contrary

To the same effect as *Carter v. Rice*, but more strongly stated, is the case of *People v. Thompson* (155 Ill.), upon a constitution practically identical in its requirements with the constitution of Virginia. The violations of this constitution by the Illinois act were claimed by the contestants in that case to have been gross and flagrant:

No district, unless a circle or a square, could be so compact that it could not be made more so. (*People v. Thompson*, 155 Ill., 482.) As much as the disposition of the legislative majority to obtain an undue partisan advantage by senatorial apportionments at the expense of equality in representation is to be deplored, the evil can not be remedied by the courts so long as the power to commit it is left in the body on which the duty to make the apportionment is imposed. (*People v. Thompson*, 155 Ill., 485.)

The moment a court ventures to substitute its own judgment for that of the legislature in any case where the constitution has vested the legislature with power over the subject, it ventures upon a field where it is *impossible* to set *limits* to its authority, and where its discretion alone will measure the extent of its interference. (60 Ill., 86; Cooley's Constitutional Limitations, 200.)

If a statute is within the authority of the legislature, as afforded by the constitution, it is *valid*, though resulting in *inequalities* and *injustice*. (*People v. Thompson*, 155 Ill., 461.)

The decision of the legislature, in the exercise of *its discretion*, as to the apportionment of senatorial districts, is *final*, and *not subject to review* by the courts. Yet jurisdiction exists in the courts to determine whether or not the statute is within such discretion. (*People v. Thompson*, 155 Ill., 451.)

The question whether the constitutional requirements of compactness of territory and equality of population in senatorial districts has been applied *at all* is one which the courts may finally determine; but whether or not the *nearest practicable approximation to perfect compactness and equality* has been attained, is a question for legislative discretion. (Id., 451.) The courts are not at liberty to go beyond the constitution, and set up a standard of their own based upon what might be deemed the inalienable rights of man, or the fundamental principles of justice and right of republican government, or some principle supposed to underlie the constitution, by which to measure the validity of an apportionment act. (Id., 451.) Only a reasonable approximation toward equality is essential under the requirements of the constitution that senatorial districts shall contain, as nearly as practicable, an equal number of inhabitants. (Id., 452.)

A statute forming senatorial districts is not void, because some of the districts, although containing more inhabitants than the minimum required by the constitution, should have contained still more, and others still less, in order more nearly to approximate perfect equality, nor because some other districts might have been made more compact, these being matters within the legislative discretion. (Id., 453.)

There are many constitutional duties imposed upon legislatures which can not be enforced by the courts, and the manner of compliance with which must be left to the sole and final determination of the department upon which the duty is imposed. (Id., 474.)

Courts ought not to pass the boundary line inclosing the discretionary power of the legislature and invade that discretion. (Id., 476.)

In this case it was a question for the final determination of the legislature as to what approximation should or could be made toward perfect compactness of territory and equality of population, and this, too, *though treating the requirements of the constitution as mandatory*. (Id., 477.)

When the general assembly, in the discharge of this duty, has not transcended this power, though it may have performed its duty very imperfectly, its act is valid. (Id., 477.)

In discussing the meaning of the word *compact*, the court very pertinently observes: "Who, then, must finally determine whether or not a district is as compact as it could or should have been made? Surely not the court, for this would take from the legislature all discretion in the matter and vest it in the courts, where it does not belong; and no apportionment could stand, unless the districts proved as compact as the judges might think they ought to be, or as they themselves could make them. As the courts can not themselves make a senatorial apportionment directly, neither can they make one indirectly. There is a great difference in saying whether the principle of compactness has been applied at all or whether the nearest practical approximation to perfect compactness has been attained. The first the courts can determine, the

latter is for the legislature." These views accord with *State v. Campbell* (48 Ohio); *People v. Rice* (135 N. Y.); *People v. Supervisors* (136 N. Y.); *People v. Thompson* (155 Ill., p. 481).

In Ohio apportionments were formerly made, and possibly at present, by a board created by the constitution. One of these apportionments was put in issue in *State v. Campbell* (48 Ohio), and an effort made to overthrow it on the usual grounds that it was unjust, unequal, and violative of the constitution. The court declined to interfere, stating its reasons for this action as follows:

"When the board created by the constitution for the apportionment of the State for members of the general assembly have made an apportionment, they can not be required to make another unless the apportionment so far disregards the principles presented by the constitution as to warrant the court in saying that it is *no apportionment, and treating it as a nullity*. (*State v. Campbell*, 48 Ohio, p. 435.) It is not sufficient for us to be of opinion that we could make a better apportionment than has been made by the board. For us to interfere and direct another apportionment the apportionment must so far violate the constitution as to enable us to say that what has been done is no apportionment at all. (Id., 437.) Whether the discretion imposed has been *wisely or unwisely* exercised in this instance is *immaterial*. The board had the power to make the apportionment. For the *wisdom or unwisdom* of what they have done, within the limits of the power conferred, they are *answerable to the electors* of the State, and to no one else." (Id., 442.)

Running through all of these cases is the principle that to justify interference by the courts the apportionment complained of must be something more than unfair, or unjust, contrived for partisan purposes. It must be *no apportionment* at all. The same question of the right of interference with the work of functionaries, clothed with the authority to make an apportionment, was considered by the court in 10 Gray, and it held "that the county commissioners were empowered to apportion the representatives, apportioned to the counties among the respective districts formed by them, and that even if the House of Representatives was satisfied that the number of representatives so apportioned was different from the number to which such districts would be entitled, if determined exclusively by the enumeration of the legal voters, still they could not reverse the same." To the suggestion that this would work out hardship and injustice, the court replied that some error may occur in all human transactions, and that those who think that they have discovered error may themselves have fallen into error in conducting their inquiries. The final power must rest somewhere. (Id., p. 624.)

This is the crux of the whole matter, whether this final power of discretion shall rest with the legislature or shall be exercised by the courts in making apportionments.

The foregoing citations make it abundantly clear that if this committee was called on to interpret the constitution of Virginia for the first time, it would have its choice between two bodies of irreconcilable cases, almost equal in numbers. But it is submitted that the conclusions reached by those courts which decline to intrude upon the legislative domain, so long as the legislature has exercised any discretion at all, rest upon the broader and sounder considerations relating to the proper functions of the courts, and of the lawmaking departments, in our system of government.

Contestant asserts that with reference to the Virginia statute of 1908, the House possesses the same power of annulment resident in the courts of Virginia. This may be conceded. The attitude of the Committee on Elections is a judicial one. It is made such by the express terms of the federal statute. In this connection it may be well to cite the majority report:

This committee is a judicial tribunal. We have no right to consider expediency or policy, politics or personality. The case should be decided upon the broad lines of justice, as determined by the facts, the law, and the constitution.

This being so, the committee should follow the interpretation placed on the Virginia constitution by the court of last resort of that State, the more readily if the conclusion reached by the court is confirmed by the conclusions of other courts of great authority, interpreting like constitutional provisions. The majority report declares

that the case of *Wise v. Bigger*, so far as it relates to apportionments, was decided with apparently but little consideration. The majority is without authority for this statement. The apportionment question was squarely presented to the court and squarely and fully decided. The brief opinion of the court on this point furnishes no index to the time that was given to its consideration. But, whether brief or prolix, it is the established, unchallenged, and unreversed law of Virginia.

The contestant had ample time and opportunity before entering upon his canvass for Congress to attack the law of 1908 in the court of last resort of Virginia and to ascertain whether it was disposed to overrule *Wise v. Bigger*. The fact that he did not do so may be taken as most ample evidence that his counsel advised him that *Wise v. Bigger* was good law and not likely to be overruled by the present supreme court of that State.

There has been no change in the Virginia constitution relating to the provisions of apportionment for Members of Congress for over forty years. In 1884 the legislature of Virginia made an apportionment which is practically the apportionment of to-day.

This apportionment was assailed in the supreme court of that State on the ground that it violated the constitution, in that the districts formed were not of contiguous counties, compact, and as nearly as may be equal in population. This question of the judicial right to interfere with apportionments was fully presented to the court in the pleadings and was disposed of as follows:

It is further alleged by the relator that this said act is unconstitutional and void, because the act does not conform to the requirements of Article V, section 13, of the constitution of Virginia, by making congressional districts of contiguous counties, cities, and towns compact and as nearly as may be equal in population.

But the laying off and defining of the congressional districts is the exercise of a political and discretionary power by the legislature, for which they are amenable to the people whose representatives they are. (*Wise v. Bigger*, 79 Va., 282.)

So the court remitted Mr. Wise to the supreme tribunal of the people.

This interpretation is decisive, and has never been overruled, questioned, or assailed, since it was afforded. How then can the Virginia act of 1908 be considered to be in excess of the legislative authority, and therefore unconstitutional, when the supreme court of that State declares that in laying off districts the legislature is not only exercising a constitutional function, but an exclusive political function with which the courts had no concern, and with which they would not interfere? In Virginia therefore it may be fairly said that the legislature of that State has the final right to make apportionments, just as the Congress of the United States will have that power, if the contention of the contestant is maintained. The moment Congress exercises the right to establish the congressional districts in the States, it will exercise a political, and discretionary power, for which it will be amenable to the people, and to no one else. Is it likely that it would be more wisely exercised than by the States? But not only has the decision of *Wise v. Bigger* never been questioned, but it has, in effect, been ratified by the present constitution of Virginia. It has been noted that in New York, it was necessary to overcome the effect of *Rice v. Carter*, by the language of a subsequent constitution. In Virginia a new constitution was adopted after the

case of *Wise v. Bigger* had interpreted the language of the old constitution with respect to the section relating to apportionments. When the constitutional convention met that body had the decision of *Wise v. Bigger* before them, impressing the language of the old constitution with respect to apportionments, with a precise and definite meaning. The convention followed the old constitution, so that it may therefore be fairly said, that the last convention adopted and ratified the meaning placed on the section relating to apportionments, by the highest court in Virginia. If, therefore, the House was indisposed to follow the line of cases outside of Virginia, announcing the principle that the courts ought not to interfere with legislative apportionments, unless they could be fairly declared to be no apportionments at all, it would hesitate to declare the statute of a State unconstitutional, with reference to the constitution of that State, when its supreme court had pronounced in favor of its constitutionality and a subsequent convention had ratified that interpretation.

The Committee on Elections being a judicial body must adopt the judicial attitude when it comes to interpret the laws of Virginia. It is not necessary in this connection to cite the familiar authorities establishing the attitude of the federal courts toward the statutes or constitution of a State which have been interpreted by the court of last resort of that State. Therefore, on the purely state question of whether the act of 1908 is violative of the constitution of Virginia, the committee should follow the court of that State. The decision of *Wise v. Bigger* has peculiar value from the fact that politically the court and the legislature which made the apportionment were opposed, and the application for judicial review was made by a member of the minority party.

The majority has cited the cases which maintain the right of the courts to interfere with apportionments, but it has paid but scant attention to those decisions which maintain the opposing view. Your minority has cited these cases in order that both lines of authority will be presented to the Members of the House. The cases cited by the minority maintain the view that so long as an apportionment is made the courts can not interfere; that to justify their interference such a situation must exist that it can be said of an apportionment that it is no apportionment at all. Applying this test to the Fifth District of Virginia, having reference to its physical size, its general appearance, and the number of its inhabitants in comparison with the districts established in other States by the legislatures thereof, it is impossible to say of it that it is no apportionment at all. It may be criticized in various ways by the members of the committee who have made the majority report. They may consider it to be far short of such a district as they would construct if given the opportunity, but after all, in a real sense, it is a district and not a nullity.

The conclusion reached by your minority, and supported by authority, is that the statute of 1908 does not contravene the constitution of Virginia, if the interpretation of the supreme court of that State is to be followed. The Committee on Elections is required by the statute to consider the questions before it, as judges would do, in order that election contests may be decided as far as possible upon the merits. This being so, the committee should not adopt, for party purposes, a different rule from the one that would be followed by a

federal court if it was asked to determine whether the statute under consideration contravened the constitution of Virginia. With respect to the further question whether the act contravenes the federal statute, it is submitted that nothing can be added to the well-considered report in *Davison v. Gilbert*, deciding the very question presented in this case. In this connection the minority insists that even if it should be considered that Congress can control the apportionment of the States into districts, and fix the delimitations of the same, it should not undertake this rôle. In the language of the report in *Davison v. Gilbert* supra:

It would be in the last degree unwise and intolerable that it should exercise it. To do so would put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that, notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

If gerrymandering is the outcome of the exercise of uncontrolled political power under certain familiar conditions, it is difficult to see how the disease will be cured by transferring the power to accomplish it from a number of diverse political bodies to one central body, which will be operated upon by the same considerations as the members of the smaller bodies. If Congress is to undertake the exercise of this authority, conceding that this body possesses it, then it ought to be done upon the theory that its assumption, and exercise, will be in the general public interests. What indication has been afforded that such has been the case, or would be the case? The latest illustration of scientific arrangement was afforded in the case of Oklahoma, when the enabling act of Congress created districts in that State with a population difference of 89,733, and scientifically grouped the democratic majorities in such fashion that one democratic district had a majority of about 25,000. The remedy offered for the disease does not commend itself. In lieu of a number of individual gerrymanders, effected by different political organizations, in different States, and working out some kind of equality, as pointed out by the report in *Davison v. Gilbert*, we will have one universal gerrymander, coextensive with the limits of the country. The effect of this new policy in unsettling tenure of seats will be intolerable. No Member would know when he would be secure from a contest, based on the grounds of disparity of population or irregularities in the physical make-up of the district. The opportunity to make a universal gerrymander would be a stake well worth the scramble of the party organizations, since it might mean a tenure of power extending over an indefinite period of years. Scores of Members in this House would find themselves threatened with contests, looking to the disestablishment of their districts. Cases like *Davison v. Gilbert*, which have been settled, will come again into the House for a further hearing. New cases will be instituted, whenever the population of a district falls as much as 20,000 below the population unit, that being the amount of the divergence in the present fifth Virginia case.

Adopt the principle that the districts must conform mathematically, as nearly as may be, to the standard of population and physical make-up, and an extensive reorganization of the districts in the country at large will of necessity follow. As we understand the majority

report, it plants itself on the principle announced in 83 Wisconsin, that—

there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion.

If this principle is to be applied straight through, and it should be done, if the Member from Virginia is to be unseated on this ground, then a Pandora's box will be opened by the assumption of this authority on the part of the House.

If the House does not propose to undertake this universal task and do complete justice, then it ought not to undertake to use this principle for party purposes, to justify the purely partisan action of unseating the contestee, merely to furnish the contestant with a seat to which he has not been elected. The majority report is erroneous on another ground. It not only proposes to unseat the contestee, but to seat the contestant. At best it can only unseat the contestee. If the statute was void, there was no election under it. This committee, as a matter of law, can not count for the contestant votes which were not cast for him in the district in which he was a candidate. So, from any point of view, this contestant should not be seated.

The majority report undertakes to hold that *Davison v. Gilbert* is not a valid precedent on the ground that there were no provisions in the constitution of Kentucky like those found in the constitution of Virginia. Granted. But this does not hinder *Davison v. Gilbert* from being authority on the federal proposition presented in both cases, namely, that the state statute was in contravention of the federal statute. So far as the other question presented in the Virginia case is concerned, it is not pretended that *Davison v. Gilbert* is any authority. It is a state question, pure and simple, to be determined according to other principles, which have been fully stated. On this proposition *Davison v. Gilbert* would be irrelevant. But the decision of *Wise v. Bigger* is pertinent and conclusive in that connection.

Unlike the committee in *Davison v. Gilbert*, which first discussed the existence of the power, and then admitting its existence, discussed the policy of its exercise and application, the majority in this case contents itself with claiming this novel authority for Congress, seeming to think that by unseating the contestee it will "shut the door of the House of Representatives to one of the most insidious and dangerous political offenses that can menace democratic government." This is a ludicrous non sequitur. Condemning in effect the exercise of a political function by an aggregation of political bodies, it selects another and greater political body as the repository of the power now held and exercised by the subdivisions. There are like men with like passions in the larger body. Is there anything in its history or anything suggested by our knowledge of human nature that makes it likely that the membership of this body, under the stress of party exigency or the suggestions of party advantage, would occupy the calm judicial attitude of a court? The weakness of the position of the majority report consists in the fact that it relies on the authority of cases in which the courts have overturned legislative appointments to justify the conclusion that the same result which is supposed to follow from judicial review will follow from political

review. The committee in *Davison v. Gilbert* agreed that the disease was bad, but concluded that federal interference through the House of Representatives would not afford the remedy. In this they were plainly right.

One concluding thought to a report which is already too extended. The majority criticises the conclusion reached in the case of *Davison v. Gilbert* on the ground that it rests on an "antiquated states-rights doctrine, which has been completely and finally refuted." In this criticism we can not concur. The decisions relied on by the majority to maintain their finding in this respect are *Ex parte Siebold* (100 U. S.) and *Ex parte Yarbrough* (110 U. S.). These decisions were before the committee which rendered its report in *Davison v. Gilbert*. They are not new decisions, and they decide nothing which was considered by that committee to interfere with the conclusions which they reached. It is not necessary to pass them in review, and it is only sufficient to say that the able lawyers who composed the committee which reported *Davison v. Gilbert* did not overlook them. The questions decided in these cases are not relevant or pertinent in this connection. Your minority finds that the contestee is clearly entitled to his seat for the reasons given in extenso and should not be disturbed.

W. E. TOU VELLE.

J. A. HAMILL.

C. A. KORBLY.

O.